

THE AMERICAN LAW REGISTER

FOUNDED 1852

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

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| VOL. { 54 O. S. } | AUGUST, 1906. | No. 8. |
| { 45 N. S. } | | |

FAMILY AND THE LAW OF FAMILY IN ANCIENT ARABIA AND UNDER THE MOHAMMEDAN DOCTRINES.

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Arabian writers recognize two great periods in the history of their country: The pre-Islamic period, or that of ignorance, and the Islamic period, dating from the time of Mohammed.

During the pre-Islamic period¹ the Arabian tribe was a politico-religious and civil community based on the same pattern as the ancient *gens romana*, and patronage and clientele are developed to a very great extent; civil relationship united them, and the clients formed an integral part of the family of the patron. The chiefs of the tribe, or the chiefs

¹ For the study of customs and manners of the pre-Islamic period reference can be had, among other works, to: The letters of Fulgencio Fresnel (*Lettres sur l'histoire des arabes avant l'islamisme*. Paris, 1836-38, and *Journal Asiatique*, 1858); the History of the Arabians by Caussin de Perceval (*Essai sur l'histoire des arabes*. Paris 1847-48); the History of the Spanish Mussulmen by Dozy, (*Histoire des Musulmans d'Espagne*. Leyde, 1861-62 and 1873); Seignette's Introduction to his Translation of the *Mojtazar* of Jalil ben Ishak (*Code Mussulmen par Khalil, texte arabe et nouvelle traduction*. Constantine, 1878), etc.

of the *gens*, became heirs in default of the next of kin; a settlement had to be made by the tribe of the murderer for the benefit of the next of kin, guardians of the victim, and, in the absence of such next of kin, the right to such settlement was acquired by his tribe.

Among ancient Arabs, apart from some traces of a polyandric existence and marriage with a brother's widow, polygamy without restriction constituted the basis of their domestic life; matrimony was a purchase and sale contract, and a woman formed part of an inheritance; on some occasions temporary matrimony was contracted, and divorce was permitted in its most simple and absolute forms.

All hereditary rights were denied to a woman and child, because to become an heir it was necessary to be able to use the javelin and defend oneself from enemies' inroads and to command a foraging party. The wife lived under perpetual tutelage, and the nearest relation of her dead husband took, by hereditary right, his widows and whatever these possessed, as also his slaves and property.

The native jurisdiction presents the features of absolutism, or rather of the most refined despotism. "The pagan Arabs," says the celebrated theologian and jurisconsult, Ez-Zamajxari, "had a great preference for male children; the announcement of the birth of a daughter to an Arab was greatly feared, and it was a frequent thing for a father to bury the child alive. But the cruelty of the father was not only directed towards the daughter, for sometimes the poor people killed their sons in order not to be obliged to sustain them."

The reforms of Mohammed as to these customs have an immense importance. It is true that polygamy is still practised, but it is restricted; the Koran permits four legitimate wives, and *counsels* the taking of only one;¹ it puts limits to

¹ "If you fear to be unjust towards orphans do not choose among the women you like to marry more than two, three or four. If you still fear to be unjust, then marry one only or a slave. This conduct will allow you to be just." (Koran, Sura IV, Aleya 3.) In respect to this question see the two works of Cadoz: *Initiation à la science du droit musulman*. Oran, 1868, pp. 67-75, and *Droit musulman* Malekite. Bar-sur-Aube, 1870, pp. 118 and following.

divorce;¹ establishes important prohibitions in regard to matrimony among persons united by certain degrees of relationship;² it limits the power of a father, prohibiting especially the cruel custom of killing children on account of indigence,³ and to bury his daughters alive;⁴ it protects most carefully the interests and rights of orphans;⁵ it not only concedes to daughters hereditary rights on the death of the father,⁶ but it also concedes to the wife a legal portion of the inheritance of the husband, not in default of heirs who are next of kin, but in every case in common with his children;⁷ and gives to the mother the right of guardianship, care, and education of her children (*hadana*); the authority of the father and the power of the mother are coexistent.⁸ In a word the Arabian woman acquires by

¹ Koran, S. II, A. 227-242.

² Koran, S. IV, A. 26 and 27.

³ Koran, S. VI, A. 138, 141 and 152, and S. XVII, A. 33.

⁴ Koran, S. XVI, A. 60 and 61, and S. LXXXI, A. 8 and 9. The following tradition (hadis) coincides with the Koranic texts of the abolition of such repulsive and cruel custom. It is told that after the conversion of the Benu Temim, Kais ben Asem, one of its chiefs, happened to enter Mohammed's house and found him with a little girl seated on his lap and whom he was kissing most tenderly. Kais ben Asem asked, "Who is the little lamb you are kissing?" "My daughter," answered Mohammed. "Allah be praised," said Kais; "many daughters had I like that one and every one did I bury alive and without kissing them." "Wretched!" cried Mohammed, "God then must have deprived your heart of every human feeling; you do not know the sweetest joy that a man possesses in kissing his daughter." See Gilman's History of the Saracens, translated and annotated by Guillen Robles. Madrid, 1889, p. 74.

⁵ In numerous passages of the Koran, among them S. IV, A. 2, 5-7, 9-11, etc.

⁶ Koran S. IV, A. 8 and 12.

⁷ Koran S. IV, A. 12 and 14.

⁸ Mohammed consecrated this principle by the following answer, which forms an essential part of the tradition (Sunna). A woman was repudiated by her husband by whom she had a son; she took the child in her arms and presented herself before the Prophet. "Prophet of God," said she, in great distress, "this child is my son; my womb was the urn in which he was concealed, my breast was the fountain from which he drank, my dress the covering in which I have him sheltered, and his father has repudiated me and now wants to snatch away my son from me and separate me from him!" "To you belongs the right of keeping the child," answered Mohammed, "until you marry again and the new matrimony has been consummated."—Perron's Précis de Jurisprudence musulmane, § 111, Paris, 1849, p. 566. The Mussulmen jurisconsults devote an important chapter in their works of *forua al-fikh* to the study and regulation of this right of maternal power, which is called *hadana*.

Mohammedan reform a real personality with very important rights which for a long period were denied to her.

A more extensive study is then required for the Law in the Islamic times, and recourse must be had to the teachings of the jurisconsults.¹ We will take as a basis the Law of the Sunnite² schools, and especially that of the Malequi, on ac-

¹ The four principal sources of the Mussulman Law are: First, the Koran, which contains the doctrine revealed. Second, the conduct of the Prophet (Sunna) or tradition (hadis). Third, the unanimous opinion El-jamaa (Ichmaa) of the Prophet's companions and of his disciples; and fourth, the doctrinal interpretation (ichtihad).

² The general differences which separate the orthodox Sunnites from the heterodox Xiies or Aliies, can be seen in Tornauw's *Le droit musulman exposé d'après les sources, traduit en français par M. Eschbach*. Paris, 1860, pp. 23 and 24, and Cadoz's *Initiation*, etc., pp. 13 and 17.

The four great Sunnite Schools to-day still in existence are: First, the Hanefi School founded by Abu Hanifa (who died at Bagdad in A.D. 767); all the European Mussulmen and the greater part of those in Asia belong to this school. Second, The Malequi School found by Malec ben Anas (who died at Medina in A.D. 795); the followers of his doctrines are those of Mecca and Medina, of Yemen, Tripolis and of Barbary, a few in Egypt and a great number in the Sudan. This School was the one received and accepted by the Spanish Mussulmen. Third, the School of Ex-Xafei (Shafei, who died at Cairo in A.D. 809); this School prevails in Egypt, on the frontier of Persian Turkey and a small number of its followers are also found in Syria. Fourth, the Hambali School founded by Ahmed ben Hambal (who died at Balch in A.D. 855); the Hambalies are scattered through Algiers and Morocco and other provinces of Africa, where they are mixed with the Malequies; they are also found in Java.

For the study of these doctrines the following works of Mussulmen Jurisconsults can be consulted:

The Hanefi School.—The *Hidayah* (Guide) of the Sheikh Xeij Borhaneddin Ali (who died in A.D. 1196 or 1197), translated to the English by Hamilton, under the title of *Hedayah or Guide*, a commentary on the Mussulman Laws. London, 1791. New Edition, 1870.

The *Multeca el-ebhar* (the confluence of the seas) of Ibrahim El Halebi, published by order of Suleiman II. (1520-66), and translated and annotated by Mouradja d'Ohsson in his *Tableau général de l'empire Ottoman*, 1748-1824.

The Malequi School.—The *Mojtasar* (Epitome) of the Egyptian jurisconsult Halid ben Ishac (who died about A.D. 1374 or 1375). translated by Perron under the title of *Précis de jurisprudence musulmane*. Paris, 1848-52.

The *Tohfat Mokhtassar* (Gift) of Aben Asem, Cadi of Guadix (who died in A.D. 1426), published by Houdas and Martel, under the title of *Traite de droit musulmane*. Algiers, 1882.

The Shafeii.—The important work of En-Nawawi (who died in A.D. 1298), *Le guide des zeles croyantes*, translated and published by Van den Berg. Batavia, 1882-84.

In respect to the doctrines of the Sheis (Xiies) the work of the Xeij El-Mohekik (who died about A.D. 1277 or 1278) can be consulted which was translated by Query under the title of *Droit musulman*. Paris, 1871-72.

count of this being the one accepted and followed by the Spanish Mussulmen, and we shall endeavor to point out the peculiarities of that which has relation to the Law of family and for which the schools of Sheis (Xiies) are distinguished.

Among people so profoundly religious and within a scientific system which regards Law as *a road marked by God for men, to serve them as a guide in life*, or as *a solid cable of health which man owes to God*, and which bases all legal organism in Divine revelation, it is a very strange thing that matrimony should have the character and aspect of a contract purely civil in which neither the State nor the Church can intervene to give to the consent of the parties a supreme sanction either Divine or human. Matrimony (*nicah*) is a bilateral contract (*contrato sinalagmático* or *baya*), like any other, which can be celebrated or annulled at will, and whose essential end is to give to the progeny a legal character.¹ Notwithstanding this, and though the principle of procreation as an essential end of matrimony predominates in the teachings of the jurisconsults, it is not possible to affirm—as it is done by treatise writers—that the mutual help of husband and wife and their life in common (*individua vitæ consuetudo*) are ideas completely foreign to Islamic Law whenever a matrimonial union is contracted within it and without an idea of carnal commerce, as it happens when a man who, on account of a physical defect or old age, is incapacitated for copulation or for procreation, marries a woman who consents to take him as her husband under such conditions. On the other hand those ideas of mutual help and life in common are clear and evident in the spirit and writings of the Koran,² and they are clearly seen in the words spoken by the Prophet on Mt. Ararat, before a great multitude of pilgrims: "Treat women well; they are your helpers and can do nothing alone. You have received them as a blessing which God has entrusted to your care and you have taken possession of them through Divine words."

¹ Borhaneddin Ali, Aben Arfa, El Chorchani.

² Koran S. II, A. 183.—"Your wives are your ornaments, and yourselves their protectors." By these words every interpreter sees the idea of reciprocal services.

The jurisconsults who follow the tendency or material (exteriorista) school, and who observe the letter and not the spirit of the Koran, consider matrimony as an obligatory act (*wachib*).¹ The Malequi jurisconsults regarded matrimony not as a *laudable* act (*mendub*), but *facultative* (*mubah*), and distinguish certain cases in which it can be *obligatory* (*wachib*) or simply *tolerated* (*mejuh*). Thus when a single man is afraid of becoming a victim of sexual passion, matrimony for him is obligatory; when through physical defects or old age a man lacks the necessary conditions for copulation or already cannot hope for posterity, matrimony is for him a facultative act, but not laudable; and when a man capable of procreation fears not to be able to carry the burden imposed by God on the husband, matrimony is for him a tolerated act, but not well approved (*mejuh*).

The Mussulmen Sunnites do not admit any other matrimony than a permanent one, dissoluble only in regard to the bond (*vinculo*) in conformity with Law; but the Mussulmen Sheis (Xiies) recognize besides this matrimony, which can be called permanent, another which is called temporary.

Let us examine these, then, according to the following order:

The necessary conditions for the constant or permanent state of matrimony are five: First, consent; second, intervention of the matrimonial representative of the woman (*wali*); third, the presence of two witnesses; fourth, the possession of a dowry (*mahr* or *sadak*), and fifth, the absence of every obstacle.

There does not exist any particular sacramental formula to express consent; it is sufficient if it is clearly manifested, and not falsified through error, fraud, or violence.

In respect to the doctrine of consent, Mussulman Law presents a particular development, creating that which can be called indirect consent.¹ This is constituted through the

¹ Mussulmen jurisconsults by means of interpretation formulate suits or verdicts (*ahcam*), juridically classifying the act as obligatory, laudable, facultative, prohibitive, tolerated, valid, and null. The idea of each one of these classifications can be seen most clearly in Cadoz's *Initiation à la science du Droit musulman*, pp. 56 and 57.

right which some persons have to compel others to contract a definite matrimony, and which right has the title of *legal coaction* (*cheber*).

The Malequi School is the one which furthers more this right of *legal coaction*, which has its historical antecedents in the pre-Islamic customs, and among the Malequies this right is enjoyed by the master in respect to a slave of either sex, the father, and the testamentary guardian (*wali*), if the father should have given him this right.

The Hanefi School confers this right of legal coaction upon all heirs, according to the principle that the nearest of kin excludes the most remote.

Where the difference of these two schools is more clearly manifested and the literal spirit of the Hanefies is most clearly marked is in that which refers to the order of persons who are subject to this law.

In regard to the Malequies, apart from the slaves, the sex has to be carefully distinguished. Treating of males, the only one subject to this law is he who has arrived at the age of puberty; from another point of view, really exceptional, is the premature marriage which he may contract; and the insane pubescent, or one who suffers from weakness of the mind (*safih*), though there are some who sustain this last case in the affirmative, still there are jurisconsults who taking into account that the *safih* disposes of his person and not of his property, exclude him, and with reason, from matrimonial coaction. In regard to females the exercise of the right of coaction is more extensive, because it embraces the virgin woman who has not reached the pubescent age, and the pubescent woman, and the insane woman whether she is a virgin or not, exception being made of the elderly virgin (*anas*) or spinster, whom we ordinarily call old maid which state is attained after reaching the age of thirty or fifty years as fixed by some authorities. In order that cohabitation may be able to void the law of coaction, it is necessary that it should be legal, that is to say, it must be

¹ Thus it is called by Zeys in his *Traite élémentaire de Droit musulman algerin*. Algiers, 1886, vol. I, pp. 3-6.

produced through the consummation of matrimony, exception being made in the case of a woman not in the pubescent state, who has prematurely cohabited with her husband and who has been repudiated or has been left a widow before attaining the age of puberty, because the consummation of marriage being condemnable, juridical action cannot be attributed to it. Finally with respect to a woman who is subject to a weak mind (*safiha*), there exists the controversy as already stated in speaking of males who also suffer weakness of mind (*safih*).

The Hanefi School develops a more simple doctrine and without making distinction of sex, and, apart from slaves, it subjects to the right of matrimonial coercion only those not in the pubescent state and the insane, without any controversy with respect to the *safih* or *safiha*, because it has always been considered that they can contract valid matrimony.

The character of the law of matrimonial coercion is that of a tutelary institution for the protection of the weak; thus it happens that in all juridical schools its practice has been surrounded by certain guarantees in order that it may not degenerate into tyrannical oppression. From this it comes that the Hanefies authorize the person not pubescent and married against his will by a person who is neither his father nor grandfather, to choose, on reaching puberty, either the maintenance or the rupture of the bond created; the right of veto which the Malequi School grants the mother who enjoys the right of *hadana*, to oppose herself to a disadvantageous marriage of a daughter; the loss of this right of coercion through a systematic abuse, either positive or negative in its practice etc.

The second of the conditions of permanent matrimony, which has already been stated, is the intervention of the representative of the woman, wrongly called matrimonial guardian (*wali*). The *múchebir* must not be confounded with the *wali*; the first is that which exercises the right of matrimonial coercion (*cheber*); the second is the representative and attorney of the woman, not subject to legal coercion, in the celebration of marriage. The Malequies consider necessary, under penalty of nullity, the intervention of

the *wali* in matrimony. The Hanefies consider the intervention merely facultative. Among the first it is only the male who can exercise this duty; among the second, there is no obstacle for the *wali* to be of the feminine sex. Finally, among the *Sheis* (*Xiies*), a woman who is of age can contract matrimony without the intervention of the *wali*. The other conditions are, that the person must be a Mussulman, free, pubescent, and possessing of discernment.

The jurisconsults present a long series of callings constituting what can be called the hierarchy¹ of the *walism*, founded principally in relationship, but the *wali* needs, in order to exercise these functions, to wait, in his capacity of attorney, to be so required by the woman, and that this one must give him, either verbally or by writing, the order which may be either special or general, and in which last case its use must be submitted to the ratification of the attorney.

With respect to the third requirement or condition of permanent matrimony, it is only necessary to say that the Law of the Mussulman considers the secret marriage null, and for this reason the presence of two Mussulmen witnesses is required; they must be male, free, pubescent, of sound mind, and of irreproachable conduct (*adil*).

The fourth essential condition of the Mussulmenian matrimony is the constitution of a dowry (*mahr* or *sadak*). It is the same Germanic principle: "There is no matrimony without a dowry;" "*Ne sine dote confugium fiat*," as the Forum Judicum says:

Nevertheless, it is not scrupulously followed among the *Sheis* (*Xiies*), and jurisconsults of this heterodox school are not wanting who regulate the matrimonial contract with-

¹ The following hierarchy which by reason of relationship has been established by the Granadine jurisconsult Aben Asem in his *Tohfat*, taking for granted the supposed state of liberty of the woman, is: First, The son, grandson, etc., indefinitely in direct line. Second, The father. Third, The legitimate brother. Fourth, The son, grandson, etc., of the brother. Fifth, The paternal grandfather. Sixth, Next come the nearest relatives according to the established order of succession (Edition of Houdas and Martel, pp. 180-182). To these *walis* may be added the testamentary guardian (*wasi*), who comes next to the father, that is, who occupies the third place in the hierarchy of the *walism* and of whom Aben-Asem also makes mention (p. 182).

out any stipulation of a dowry (et-Tefid), and they declare that this is not an indispensable condition for the validity of matrimony.¹

The nature of the Arabian dowry corresponds—like the Germanic dowry—to the ancient purchase of the woman; and the dowry is nothing more than that which the husband promises to deliver to the woman and actually delivers as an equivalent for her person.

Leaving aside all the differences of enumeration which the different schools establish, and confining this summary exposition to the Malequi doctrine, we will point out briefly that the dowry must be determined by a sum, class, and quality, either by decision of a third party to whose arbitration the question is submitted; and when there is no agreement or the third party nominated does not want or cannot accomplish his commission, then the dowry is understood to be stipulated and which is called of equivalence or parity (*Sadak et-matal*), or it may be that fixed by use in the country to which the woman belongs, taking into account the religious principles, beauty, and social position of the woman, the dowry received by her sister, etc.

There has not been established by the doctrines of the jurisconsults, the *maximum* of the dowry, but on the other hand the *minimum* has been carefully fixed. The Kadi of Guadix, Aben Asem, fixed as a minimum *a fourth of a dinar*, equivalent to *three legal dirhems*, or approximately to twenty dirhems of the money in currency in Mussulmanic Spain during his time; "to which dirhems," he said, "five more must be added in order to obtain the exact value."²

Although Malec advises the integral payment of the dowry before the consummation of matrimony, this doctrine has

¹ The Mohekik, I, pp. 719-721.

² That is to say, to make up the deficit which could result from the alteration of the coin, then so frequently done, and thus avoid the diminishing of the dowry from its legal limit on account of its value. The dinar is the superior unit of the gold coin. In respect to the dinar and the dirhem, see Vazquez Queipo's *Essai sur les systèmes métriques et monétaires*, Paris, 1859, II, p. 110, and following. The legal value of a dinar is a little more than 13 pesetas gold (about \$2.50 U. S. Cy).

not prevailed, and at the time of Aben Asem,¹ except where the woman required the total delivery of the dowry, only half of it was ordinarily paid before the consummation of matrimony, and a period of from six months to twenty years, according to the rank, age, and social position of the husband and wife, was fixed for the payment of the rest. That is why it was said, on mentioning the nature of the dowry, that it was that which the husband delivered and promised to deliver to the woman as an equivalent for her person.

The result of this doctrine is that the woman can reject the consummation of matrimony if the stipulated dowry has not been delivered to her, and, if within the period conceded to the husband by juridical authority, he has not paid the part of the dowry which he is obliged to pay, the matrimony is declared null, unless the woman consents to accept him as her husband under such conditions, and in the position of his creditor.

The dowry belongs to the woman, and when her guardian has received, by virtue of his character as such, a portion of it, he is obliged to give an account of it when the guardianship ends. Lastly, considering the system of separation of property which constitutes the economic basis of Mussulmanic matrimony, the woman is the owner of the dowry, and she can dispose of it by onerous title without need of previous authorization. Only one third of her property can be disposed of by gratis title, and her husband has

¹ Aben Asem, or Abu Becr Mohammed ben Mohammed ben Mohammed ben Asem, was born at Granada the 12th of Chimada II, in the year of 760 of the Hegira (April 11, 1359) and died the 11th of Xawal of 829 (August 16, 1426). He was one of the most illustrious of jurisconsults during that period of decadence, and at the age of sixty was appointed Kadi of Guadix. A copy of his Juridical poem *Et-Tohfat* is preserved in the Library of the Escorial (No. 1,093 which is the 1,088 number according to Casiri), and another copy is found at the Madrid National Library (No. 216). This work as already indicated was published at Algiers in 1882-93 by Messrs. Houdas and Martel. Another poem of Aben Asem upon the principles of the Mussulmanic Law, constitutes the second No. of the Manuscript No. 653 (650 according to Casiri) in the library of the Escorial. His biography and a list of his works are to be found in the *Studies of the Arabian-Spanish juridical literature*, written by D. Rafaeil de Ureña, professor of the Law Faculty of the Universidad Central (Madrid).

the right, according to some, to reduce the donation, and according to others, to annul it.

The last of the conditions that have been mentioned as to be required in regard to permanent matrimony is lack of every impediment, that is, the non-existence of prohibitive causes for matrimony (*Esbab-et-tehrim*). The determination of these causes and their explanation, and the development, constitute one of the most important doctrines of Mussulmanic Law. The jurisconsults mention numerous causes for an obstacle to matrimony, classifying them as absolute and relative, eternal and temporal. We shall give as brief a statement as it is possible for such an extensive doctrine.

The first obstacle or impediment, mentioned by the interpreters of this doctrine, is the matrimonial prohibition originated by relationship. Under this view we can distinguish blood relationship (*neseb*), that of lactation (*redaa*), and that of affinity or alliance (*mosahera*).

In legitimate relationship, matrimony is prohibited in direct line between ancestors and descendants indefinitely. Between collaterals the prohibition extends only to brothers and the descendants of these with their uncles. Cohabitation produces a natural relationship which engenders the same impediments as those of legitimate relationship.

Relationship produced by lactation has its basis in the supposition that the woman who nurses a child gives him life as if she were his own mother. So it is that tradition interpreting the Koranic test has instilled into the jurisconsults that principle that every prohibited marriage by reason of relationship is also prohibitive among persons bound by lactation. The Xafeies, nevertheless, make exception of some cases, in which matrimony is permitted in spite of this existence of relationship.

With respect to relationship through affinity or alliance, we will say only that it produces the same impediments as by natural relationship, though only the marriages between mother-in-law and son-in-law, father-in-law and daughter-in-law, stepmother and stepson, stepfather and stepdaughter,

have the character of being absolute. The prohibition of having two sisters for wives ceases, however, when the bond of relationship has been broken by death or divorce, that is, that prohibition here is of simultaneity and that the divorcee or widower can legally marry the sister of his dead or divorced wife.

The second impediment is the difference of religion. The Sunnite Schools, founded on tradition, admit the matrimony of a Mussulman to a *quitabiya* woman, that is, to a Christian or Jewish woman,¹ because these profess a revealed religion.

The Sheis (Xiies) do not admit permanent matrimony with any one but a Mussulmanian woman, and permit only temporary marriage with Christian and Jewish women and *guebras*.

The third impediment is the existence of a preceding marriage on the part of the woman. It is well understood that in not permitting polyandry, the existence of a preceding marriage on the part of the woman is an absolute and perpetual or permanent impediment, that is to say, that it subsists whilst the matrimonial bond exists. And in respect to the man, polygamy is permitted but restricted by the Koranic precept of a minimum of four legitimate wives. Nevertheless, the Sheis (Xiies), who permit temporary marriage, circumscribe the Koranic prohibition for permanent marriage, and permit for the temporary marriage an unlimited number. It is not only in the Sunnite Schools that this prohibition of having more than four legitimate wives is to be considered, but the right which is conceded to the woman to demand by means of the matrimonial contract, the monogamy of her husband. From this springs a prohibition which is absolute and permanent, relative or temporary, according to circumstances, the woman being

¹ The Mussulmen call People of the Book (*quitab*) the Christians and the Jews, because they possess sacred books which contain the Divine revelation, as their Pentateuch and their Gospel, at the same time that they see in the Koran the last expression of this Divine revelation. This consideration of the people of the Book (Christians and Jews) is of great importance in the Mussulmanic Law.

enabled to reject such a condition when it interests herself alone, or to exact its maintenance.

A fourth impediment enumerated by interpreters of law is that called *adda* and *istibra*. The word *adda* indicates the period of continence imposed by the law on the free wife or slave in consequence of the revocable or irrevocable dissolution of matrimony, in order to avoid the confusion of offspring, except in the case where the repudiated woman is again united to her husband. The period, in case of repudiation, is of three months, and, in case of death, it is of four months and ten days, counting from the same day on which the repudiation was effected, or from the day on which the husband died. The *istibra* has the same end in view as the *adda*, but it indicates the period of continence imposed by reason of licit concubinage or illicit relations, and it is of the same duration as the former. These two cases then constitute two real obstacles both absolute and temporary in order to contract matrimony. The Mussulmanic jurisconsults make a careful study of these two legal continences, especially in that which has reference to the cases which give place to it and to their juridical effects in that which refers to marital authority, the necessary maintenance of the woman, her domicile during the *adda*, etc., developments of a doctrine which we are not permitted to study on account of the nature of this summary exposition. With respect to this class of impediments, we will add, that on account of the reasons mentioned, and to avoid the confusion of the offspring, pregnancy is reputed, until the time of parturition, as an impediment for matrimony and with the same characteristics of absolute and temporary impediments.

The existence of a preceding matrimonial petition can be considered as a fifth impediment whilst it has not been rejected.

For pious causes matrimony is also prohibited, such as during the fulfilment of a pilgrimage, from the time in which the man has dressed in the *ihram*, a particular dress

of the pilgrim, and in this manner the sixth impediment is constituted.

The seventh is the triple repudiation which renders a new marriage illicit between the husband who repudiates and the repudiated woman, except in case where the latter has contracted marriage for the third time, and that this union has been dissolved by death or repudiation. In this case the impediment disappears. This was one of the means by which Mohammed tried to limit divorce, and the practice of it shows us that it has answered well the ends for which it was instituted.

Lastly, there are considered as impediments of matrimony inequality of condition, sickness which carries with it a fatal end, and the existence of an incurable malady such as engendered by certain diseases, as leprosy, elephantiasis, insanity, and certain sexual-organic defects.

The conditions for permanent state of matrimony being examined in this manner, it only remains to be shown that matrimony is not to be understood as perfected until it has been consummated and that for this consummation, presumed as such in certain cases to be valid, it is necessary that husband and wife should be pubescent.

Aside from these essential conditions called *arcan* or protective conditions, the parties can stipulate whatever clauses or conditions they consider suitable, calling them, in the language of Spanish Law, "matrimonial capitulations" (*Quitab-ennicah* or *Quitab-es-sadak*).

The jurisconsult of Granada, Aben Asem, is of the opinion that clauses contrary to the essentials of matrimony cannot be stipulated as conditions, but that all the rest can be established at the parties' pleasure; and the *kadi* of Cordoba, Aben Salmun, names, among the stipulations which the woman on marrying can demand in the corresponding matrimonial capitulations, the stipulation of the most absolute monogamy, that is, that the husband shall not give her a rival nor have concubines, putting an end to his relations with his slaves and establishing, in case of infraction, the

dissolution of the tie that binds them by means of a definite repudiation.

It is to be observed that polygamy is not considered by jurisconsults generally as an essential condition of matrimony which consequently admits a stipulation to the contrary; whilst Aben Salmun and other interpreters of the Law regard the rejection of the legal hereditary quota, in which the woman shall not have the right to be supported by her husband, and several others, as conditions contrary to the essentials of matrimony.

Finally, in these matrimonial capitulations the relations, which could be called economical relations of matrimony, are changed, and in practice it introduces some modifications of the general system established by law for the partition of property.

In regard to the effects of matrimony, we shall distinguish those relative to the married couple from those referring to the children.

By establishing duties which must be fulfilled by the married couple in respect to each other, giving the domestic authority to the husband ¹ and putting in harmony the rights of the latter in respect to tetragamy with his duties towards each one of his wives, the Koran has fixed the basis of the Mussulmanic family which has been developed by tradition and the doctrines of jurisconsults.

The woman owes obedience to her husband and is able through her own initiative to contribute to the preservation and prosperity of the domestic fortune. It corresponds to the husband to defray all the expenses of maintenance, habitation, dress, domestic service, etc., including even the articles of toilet of his wife, and he cannot oblige her to live with his parents nor to accept a habitation in common with her rivals or his other wives; and jurisconsults decipher with minute details the rules which the husband must follow in the manifestation of his conjugal affection when he is a polygamist. Lastly, matrimony does not carry in itself the

¹ Koran, S. II, A. 228; S. IV, A. 37.

confusion of the patrimony of the married couple,—that is to say, that the system of separation of property is developed, as it has already been noted on speaking of the doctrine of the dowry; and when a woman is of age and her ability to manage her property has been recognized, she is at liberty to do so and to appear in court without the authority of her husband and without any other limitation than that of not being able to dispose by free title of more than a third part of her property; such partial interdiction being created to guarantee to the husband his rights of succession in the inheritance of his wife.

In respect to the sons, the paternal laws or rights receive only and exclusively the name of tutelage and the father is nothing more than the first of the guardians, the legal guardian *par excellence*. In this regard the right of legal coercion in matrimony, such as has been already treated, has that of fixing the domestic dwelling and of disposing by onerous title of the property belonging to his son, without the necessity of proving a just cause for transferring of property and without this being subject to special formalities. Nor is it necessary to observe definite rules in respect to the employment of the price obtained, though as a guardian he is obliged to render an account when his son becomes of age. Moreover in case that the father should take advantage of these rights of administration and waste the property of his son, the *kadi* can suspend such rights, either by declaring the father not capable to administer the property, or taking from him the guardianship and appointing a new guardian. And with respect to the transferring of property by free title, the father cannot make a gift of any of the property of his son, under penalty of nullity, except with a pious intent, for instance, the manumission of a slave, alms to the poor, etc.

At the same time that the father has these rights, he also has his duties, such as of attending to the maintenance and education of his son until he arrives at the pubescent age and has the necessary intelligence to take care of himself

and to work. With respect to the daughters, these duties are performed until the day they are married, and matrimony is consummated. Such is the paternal power in the Mussulmanic Law, without having an especial name by which to designate it, and considering this power only as the first in the number of guardianships. Along with the paternal power coexists the maternal power; along with the guardianship of the father that which the mother exercises in the first period which has received the special name of *hadana* and whose origin is found in the *Summa* or conduct of the Prophet which, as we know, is the second source of the Islamic Law. The *hadana* is real guardianship and effective dismemberment of the paternal authority which coexists along with this latter, which subsists even after the dissolution of the matrimony, and is constituted for the education of the child and everything in relation to his habitation, alimentation, dress, etc. The expenses incurred for his support are defrayed by the father or from property possessed by the child. The duration of this guardianship in the Sheis (Xiies) Schools is limited to the period of lactation, that is, two years with respect to the sons, and seven in the case of the daughters; and this *hadana* is conferred on the Mussulman woman. More broadness of spirit exists in the Sunnites' Schools, especially in the Malequi School, because in this latter it is conferred on a woman be she Mussulmanic, Christian or Jewish, and it lasts, in regard to the sons, until puberty, and in regard to the daughters, until they marry and matrimony is consummated.¹ "The mother," says Aben Asem, "is the most capable for the guardianship of her child," the *hadana* having a character essentially feminine, and after the mother comes the grandmother, great-grandmother, maternal aunts, etc. To conclude, we will add that the bad conduct of the *hadina* (which is the name of the woman who exercises the

¹ Aben Asem says "That the *hadana* lasts for the sons until the second dentition," but he adds "that according to the opinion mostly adhered to, it is prolonged until puberty" (p. 33). In fact this last doctrine is the one most accepted by the Malequi writers, and the first most generally followed by the Hanefi jurisconsults.

hadana) or her marriage anew are considered causes for the extinction of the guardianship.

Besides the duties of respect and obedience of the children towards their parents, they are obliged to attend to their support and maintenance when these are in poverty.

The doctrine of the dissolution of matrimony in Mussulmanic Law is rather complicated; the interpreters of law quote many causes which receive different names. The nature of this historical summary forbids us to name in detail the different juridical rules which are applied to the different cases and we will limit ourselves to name a small number of them. First, That considering matrimony as a contract verified purely by consent, the mutual dissent is the first cause for its dissolution. Second, That the husband can by his own will obtain dissolution of marriage by repudiating his wife, and in order that this repudiation should be effective, aside from conditions of capacity, intention, place and formula, must be pronounced three times, that is, the Law requires, for this reason, a triple repudiation for this dissolution of marriage. Third, That the woman has also the right in certain cases of repudiating her husband, although limited by the new doctrine, provided she gives proofs before a *kadi* of the serious injuries she suffers, as for example, if monogamy has been stipulated in the marriage contract, and the husband does not fulfill his promise or if he uses personal violence against her, etc. Fourth, That matrimony can be annulled by the *kadi* when one of these causes, pointed out by the interpreters, exists, such as the lack of consent, the union of persons who have a legal impediment, etc., and that this annulment produces the same effects as of repudiation. Fifth, That there are other causes known, such as the oath of continence (*el-ila*), the injurious assimilation (*ed-dihar*), and the anathema or malediction (*el-lean*), which are also causes for the dissolution of matrimony. The *ila* is the engagement under oath which exceeds four months, contracted by a pubescent Mussulman endowed with discernment and capable of cohabitation, in which he does not exact from his wife, when the latter does not nurse, the fulfillment

of the conjugal duty; if at the end of the period the husband still keeps this vow without annulling it by means of expiation,¹ the marriage is dissolved by irrevocable repudiation. The *dihar* is the act by which the husband assimilates his wife to another person with whom he is forbidden to marry, for example, to declare that she is to him as the shoulder of his mother. The *dihar* does not dissolve the marriage thereupon, but it prohibits all cohabitation between husband and wife, and if at the end of four months the husband does not voluntarily submit himself to expiation, the wife can have recourse to the *kadi*, and if the husband still refuses every expiation the dissolution is established. Finally, the *lean* is the anathema or malediction which, in the name of God, the husband pronounces against his wife, accusing her of adultery or denying the paternity of the child about to be brought forth, and the oath by which the woman affirms that the husband lies. These extraordinary proceedings are instituted to which recourse must not be had except when there are no other means of proving either the adultery or the illegitimacy of the foetus. When the husband refuses to pronounce the fourfold oath, he is convicted of having rashly accused his wife, and she has the right to demand the rupture of the marriage bond; if the husband should swear and the wife refuses to do it, she is convicted of adultery, and, without detriment to the punishment to which it may give place, the marriage is dissolved; if both swear the two oaths are destroyed; but the marriage is dissolved in every case where one of them has lied, when it is not known which of them has done so, and, wherefore, life in common is impossible.

Having expounded the doctrines relative to permanent matrimony, the only one recognized by the Sunnite Schools, a few words will be said in relation to the temporary matrimony which is recognized and accepted by the Sheis (Xiies) Schools besides the permanent state. The temporary matri-

¹ These expiations consist in religious or charitable practices, for example, to feed or clothe a certain number of the poor, to fast, to free slaves, etc., and they are determined by a religious law or the doctrine of jurisconsults in each case.

mony is called *En-nicah el monkete*, or simply *El-mohell*, and is subject to the following rules: First, It can be contracted between a Mussulman and a Mussulman woman or *quitabiya*, that is, Christian or Jewish, but there is a controversy about it being permissible to contract matrimony with a *guebra*. Second, It is an essential of the contract that mutual consent shall fix the term or period of the duration for the matrimony, and the omission of the formality makes it permanent. Third, It is essential, in the same manner, under penalty of annulment, the estipulation of the dowry (*mahr*). Fourth, The matrimony is dissolved *ipso jure* on the termination of the period agreed upon, the woman has the right to leave her former husband without his permission, and if the husband and wife desire the prorogation of their marriage, the celebration of a new contract is indispensable. Fifth, If the woman desires to contract matrimony with another Mussulman, she must wait until assurance is had of not being pregnant, and if the husband should die before the termination of the period of matrimony, the woman cannot contract another matrimony until the end of four months and ten days, and if she is pregnant until after her delivery. And sixth, Husband and wife married temporarily are not heirs to each other; but some jurisconsults recognize the validity of the contractual provision by which successory rights are permitted.

As an ending to the doctrines of permanent state of matrimony here expounded, and of its juridical effects, we must make some observations about the theory of emancipation and legal age, and of the foundlings or abandoned children, of guardianship, and of the rights of the widowed consort in the succession of the deceased.

In the emancipation theory and that of legal age, distinction must be made on one hand about the government of the person and the administration of the property, or what could be called the *somatica* guardianship and *crematica* guardianship, and on the other hand the sex, for the doctrine varies in relation to males or females. The male child, of free state in that which refers to the government of the person, is

considered of legal age on reaching puberty accompanied by discernment, and from that instant he may leave the domicile of his guardian. Emancipation is the act by virtue of which the minor is placed in an intermediate state between the minors not emancipated and those of legal age, and it is called *ijtibar-er-roxd*, preparation or trial of discernment and legal age which consists in allowing to the minor the free administration of a part of his property in order to judge by these means if he is capable of being declared of legal age. With respect to the administration of property, the male child is considered of legal age (*raxid*) when he is pubescent and has been declared of legal age by his father before two witnesses or the *kadi*. The same declaration must be made by the testamentary guardian when the father is dead, and in case of ill-will on the part of the guardian, by the magistrate or *kadi*. That is, that the male child is freed from *somatica* guardianship through puberty, and thenceforth acquires the government of his person, and of the *crematica* guardianship, through the declaration of the father, guardian or the *kadi*. With respect to females, the daughter of free state is not considered of legal age until she reaches puberty and matrimony is consummated. If she does not marry, she continues to be considered a minor until the age called *tanis* is reached (fifty years, according to general opinion). As it is natural, though the pubescent woman who has contracted matrimony is considered of legal age for the government of her person, yet she is obliged to live in the conjugal dwelling, or in that one which she may have chosen in the matrimonial provisions. And with respect to the administration of her property it is enough that to the conditions of puberty and consummation of matrimony should be added the declaration of two witnesses of her capability to administrate her property, which declaration must be made by her father, guardian or *kadi*, according to the case.

The foundling is called *lakid* (found), and to be so he must be ignorant of his parents identity and of their condition. Every Mussulman who is pubescent and sound of

mind is obliged to take in the foundling and to attend to his maintenance, except where recourse is had to the father of the child, when he becomes known and is solvent. The foundling is called a free man and *maula* or client of the Mussulman community, and he is considered a Mussulman whenever found in a locality inhabited by Mussulmen, though it may be inhabited only by two families.

Testamentary guardianship is that which the father confers in his will, and it is an emanation of the power of paternal guardianship.

It corresponds to the *wasi* (the same as the guardian) both the *somatica* and *crematica* guardianships, that is, the government of the person of a minor and the management of his property. In regard to this point it is to be noted that the *wasi* cannot dispose of the property of the minor except by onerous title and for evident advantage of the ward. If it refers to personal property, he is not obliged to allege a justifiable reason, nor is the sale subject to any special formalities, but when it refers to real property, the jurisconsults enumerate the reasons which alone authorize the sale, such as the necessity of looking after the maintenance of the ward or the settlement of a debt when a higher price is offered than the value of the real property; in case of non-partition, etc., the sale must be made by public auction, the guardian being obliged to use the money thus obtained in the purchase of other real estate, excepting in the case of attending to the maintenance of the minor or the payment of debts the amounts of which are already ascertained.

The widowed consort has legitimate rights of succession to the deceased,—rights which vary according to the case, and are half or a fourth as to the husband, and a fourth or an eighth as to the wife. It is not feasible in this particular branch of the Mussulman Law to treat of the rights of succession, as that constitutes an especial branch of Moorish jurisprudence which offers many complications.¹

¹The author wishes to acknowledge his indebtedness to Dr. F. Sanchez Roman of the University of Madrid for the substance of this article.